

# The Negotiation Process: Exploring Negotiator Moves Through a Processual Framework

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**ABSTRACT:** *This paper takes a processual approach to the analysis of negotiation. The analysis is undertaken through six case studies of negotiations, which were part of a year-long ethnographic study of commercial mediations conducted by the author. The six case studies offer an analysis of negotiator moves during the process, resulting in a suggested processual framework for negotiation. Patterns of interaction during real-life negotiations are explored, disclosing the existence of a six-phase bi-directional processual foundation, superimposed by a repetitive processual arc of phases interacting with one another within and during the process. The six stages disclosed by the data are: Unilateral Articulation of Positions, Information Exchange, Testing of Positions, Shift in Position, Bargaining Proposals, and Joint Decisionmaking for Final Agreement.*

## I. INTRODUCTION

The study of negotiation offers the researcher a number of analytical frames through which to conduct an exploration. Theorists have approached negotiation as a series of strategic moves defined by the nature of the moves, as irrational human behaviour due to cognitive realities affecting decisionmaking, or as a process of interactions.<sup>1</sup> Arguably, negotiation is an

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\* Centre for Commercial Law Studies, Queen Mary, University of London and London School of Economics and Political Science. I am grateful for the advice and support of Simon Roberts, Frederick Zemans and Ben Babcock. This article will be published as part of a book chapter in DEBBIE DE GIROLAMO, *THE FUGITIVE IDENTITY OF MEDIATION: NEGOTIATIONS, SHIFT CHANGES AND ALLUSIONARY ACTION* (Routledge forthcoming April 2013), an ethnographic study of commercial mediation.

<sup>1</sup> Sebenius offers a summary of four such frameworks:

To take but a few examples, these range from the popular *Getting to Yes* (Fisher, Ury, and Paton 1991) world of interests and best alternative to a negotiated agreement, to more formal game-theoretic accounts of strategic interaction and asymmetric information (see Schelling 1960; Raiffa, Richardson, and Metcalfe 2002), to the behavioral lenses of cognitive and social psychologists (see Bazerman and Neale 1991; Thompson 2001), and to the “3-D” world of setup, deal design, and tactics intended to create and claim value on a sustainable basis (see Lax and Sebenius 2006).

James K. Sebenius, *Review Essay: What Can We Learn from Great Negotiations?*, 27 NEGOTIATION J. 251, 253 (2011). See also, e.g., Carrie Menkel-Meadow, *Why Hasn't*

amalgam of all three. The process involves social interaction. Cognitive influences inform the social interaction. Strategic moves occur within the process. Neither cognitive influences nor strategic moves alone, however, comprise negotiation. They are elements of a process that *is* negotiation. Decisions need to be made within a process of continual social interaction. This process furnishes the foundation of negotiation.

Process provides the crux for the exploration of negotiation in this article. In particular, my ethnographic study conducted of commercial mediations in 2006 and 2007 proved fruitful for an investigation of the shape of negotiations as manifested during negotiations in action.<sup>2</sup> As a participant-observer at mediations, I obtained direct insight into the negotiation process, thereby gaining access to the opaque world of negotiations.<sup>3</sup> Given the difficulty of obtaining access to mediations due to issues of confidentiality and litigation privilege, this ethnographic foray into mediated negotiations provides a unique vantage point from which to explore issues relating to the negotiation process. As Menkel-Meadow states, observing mediations can illuminate the negotiation process: it discloses what negotiators do during the process; it discloses the process itself.<sup>4</sup>

Gulliver speaks of the need to understand the real-life patterns of negotiation. His examination of negotiation is based on real-life data.<sup>5</sup> Similarly, this article relies on real-life data to deconstruct the negotiation process through an analysis of what occurs during the process. It intends to

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*the World Gotten to Yes? An Appreciation and Some Reflections*, 22 NEGOTIATION J. 485 (2006) and Rebecca Hollander-Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 381 (2010–2011), for summaries of the legal negotiation literature.

<sup>2</sup> In 2006 and 2007, I conducted an ethnographic study of commercial mediations in England and Wales. The ethnographic methodology is described below.

<sup>3</sup> Menkel-Meadow notes the need for “a good empirical picture of what negotiators actually do outside of laboratory settings in a wide variety of real-world settings.” Carrie Menkel-Meadow, *Chronicling the Complexification of Negotiation Theory and Practice*, 25 NEGOTIATION J. 415, 423 (2009).

<sup>4</sup> Carrie Menkel-Meadow, *Lawyer Negotiations: Theories and Realities —What We Learn from Mediation*, 56 MOD. L. REV. 361, 371–75 (1993). Mediation as an assisted or facilitated negotiation underlies this rationale. For a discussion about the nature of mediation as negotiation, see DEBBIE DE GIROLAMO, *THE FUGITIVE IDENTITY OF MEDIATION: NEGOTIATIONS, SHIFT CHANGES AND ALLUSIONARY ACTION* (forthcoming April 2013); see also, e.g., Robert A. Baruch Bush, *‘What Do We Need a Mediator For?’: Mediation’s ‘Value-Added’ for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 3–4 (1996–1997), (referring to the generally accepted view of mediation as facilitative or assisted negotiation, but saying that there are other approaches to the process as well).

<sup>5</sup> P.H. GULLIVER, *DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE* 65 (Academic Press 1979).

build on existing theoretical knowledge of the process through real-life data analysis. The perspective follows Gulliver's approach in many ways—it provides a descriptive analysis of the negotiation process through ethnographic data of negotiations obtained during observations of mediations.<sup>6</sup> In so doing, it is influenced by Gulliver's methodology and revisits his processual model<sup>7</sup> as well as those espoused by other processual theorists such as Stevens,<sup>8</sup> Stenelo,<sup>9</sup> Douglas,<sup>10</sup> and others.<sup>11</sup>

This article does not offer a prescriptive account of negotiation theory nor a "how to" guide to effective negotiation. Rather, it seeks to establish, through a processual descriptive approach to negotiation, a processual framework for negotiations of commercial disputes. The empirical data from my study suggests six phases in the negotiation process: Unilateral Articulation of Positions, Information Exchange, Testing of Positions, Shift in Position, Bargaining Proposals, and Joint Decisionmaking for Final Agreement. An attempt will be made to articulate such a processual

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<sup>6</sup> *Id.* at 60–67.

<sup>7</sup> See *id.* at 122–70 for a discussion the eight phases of his developmental model which are: (i) the search for an arena (ii) composition of agenda and definition of issues (iii) establishing maximal limits to issues in dispute (iv) narrowing the differences (v) preliminaries to final bargaining (vi) final bargaining (vii) ritual affirmation and (viii) execution of the agreement. For a brief discussion about the cyclical model of information exchange and learning that, together with the developmental model, creates patterns comprising the negotiation process, see *id.* at 83–88.

<sup>8</sup> CARL M. STEVENS, *STRATEGY AND COLLECTIVE BARGAINING NEGOTIATION* 10–11, 57–121 (McGraw-Hill 1963) (referring to two stages of negotiation defined by competitive and co-operative strategies).

<sup>9</sup> LARS-G. STENELO, *MEDIATION IN INTERNATIONAL NEGOTIATIONS* 91–111 (Eric Clayton Coble trans., Nordens boktryckeri (Studentlitteratur) 1972) (discussing three stages of the negotiation process arguably premised on substantive goals and the strategic moves to achieve them).

<sup>10</sup> Ann Douglas, *The Peaceful Settlement of Industrial and Intergroup Disputes*, 1 *CONFLICT RESOL.* 69, 72–81 (1957), (offering a three-stage process, which relies on the actions taken and results gained by the parties as opposed to their strategic moves).

<sup>11</sup> See, e.g., GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 72–84 (West Publishing 1983) (suggesting a five-stage process focusing on preparation, communication, and bargaining action); SIMON ROBERTS & MICHAEL PALMER, *DISPUTE PROCESSES: ADR AND THE PRIMARY FORMS OF DECISION-MAKING* 125–31 (Cambridge Univ. Press 2d ed. 2005) (following Gulliver's model with suggested amendments to Gulliver's second and seventh stages); William Zartman, *Processes and Stages*, in *THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR* 95, 96–97 (Andrea Kupfer Schneider & Christopher Honeyman eds., A.B.A., Section of Disp. Resol. 2006) (suggesting an approach which is similar to Williams' in focus, but reducing the model to a three-stage process).

framework through case-study analysis of mediations observed during my period of fieldwork research.<sup>12</sup> These phases are described and analyzed through six case studies; each reflects a stage in the process. Together, they offer a processual framework for negotiation.

## II. THE ETHNOGRAPHIC EXERCISE

Before embarking on an exploration of the processual stages of negotiation, a word is necessary about the research methodology. The data analyzed in this paper comes from an immersion into “thick description” offered by ethnography. My approach to fieldwork reflects Geertz’s thick description<sup>13</sup> and my data will be presented through the case study method as developed from Turner’s social drama.<sup>14</sup> Once textualized, the data is analyzed for what it discloses about the negotiation process.<sup>15</sup>

My fieldwork site focused on commercial mediations conducted through a pre-eminent British mediation service provider.<sup>16</sup> The organization advised and administered the mediation process, providing access to its panel of accredited mediators. The physical locale for my ethnographic study was London, England. I attended the organization’s offices during regular business hours as a member of the team through which mediations were administered.

My role during the year was multi-fold. However, the most important role was as participant-observer in thirty-eight commercial mediations during

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<sup>12</sup> For purposes of this paper, portions of six mediated negotiations are textualized. Data from case studies and corresponding analysis is often found in anthropological examinations of dispute resolution processes. *See, e.g.*, V.W. TURNER, SCHISM AND CONTINUITY IN AN AFRICAN SOCIETY: A STUDY OF NDEMBU VILLAGE LIFE (Manchester Univ. Press 1957); JOHN L. COMAROFF & SIMON ROBERTS, RULES AND PROCESSES: THE CULTURAL LOGIC OF DISPUTE IN AN AFRICAN CONTEXT (Univ. of Chi. Press 1981).

<sup>13</sup> CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 3–30 (Basic Books 1973).

<sup>14</sup> TURNER, *supra* note 12. For a more complete discussion of the ethnographic method and its influence on this study see DE GIROLAMO, *supra* note 4.

<sup>15</sup> James Clifford speaks of the textualization of ethnographic data in James Clifford, *On Ethnographic Allegory*, in WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY 98, 115 (James Clifford & George E. Marcus eds., Univ. of Cal. Press 1986); *See also* Talal Asad, *The Concept of Cultural Translation in British Social Anthropology*, in WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY 141, 143–44, 159 (James Clifford & George E. Marcus eds., Univ. of Cal. Press 1986).

<sup>16</sup> This general category of commercial mediations included matters dealing with employment, property, intellectual property, personal injury, construction, engineering, finance, insurance, IT, medical negligence, partnership, professional negligence, and shipping claims.

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the period between December 2006 and September 2007.<sup>17</sup> I attended these mediations as an assistant mediator and independent researcher observing the process with the consent of all parties.<sup>18</sup>

### III. PHASES OF NEGOTIATION REVEALED

#### A. *The Paradigm*

The paradigm examined in this study generally involves two parties (the standard paradigm according to Pruitt and Carnevale), represented by legal advisers, and often comprising more than one individual party representative.<sup>19</sup> The negotiations occur in the context of a civil dispute, aptly described by Williams:

In civil disputes, one party or the other has (or believes he has) legal rights against the other that are enforceable in court. If the parties cannot resolve the dispute, the complaining party can compel the reluctant party to defend against the charge. At this point, the defending side cannot walk away and find someone more pleasant to dispute with.<sup>20</sup>

The civil disputes under examination deal with commercial matters, often involving sophisticated negotiators, contractual or other legal obligations, and an alleged breach for which a remedy is sought. For whatever reason, the parties attempt to negotiate a solution of the dispute.

These parties are bargaining in the shadow of the law—the courthouse is only a stone's throw from the negotiation table. The parties are aware of the availability of adjudication to resolve the dispute if it cannot be resolved inter-party. Menkel-Meadow sees this as a reason why many negotiations occurring within this context are adversarial, competitive, and are often seen

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<sup>17</sup> The mediations were randomly selected. Once a mediation was confirmed as scheduled, I would be advised of its date. As long as I was available on that date, it was a commercial mediation, and it was within a two-hour train ride from London, I accepted.

<sup>18</sup> I attended the mediation with the appointed lead mediator who had full control and responsibility for the mediation. The assistant mediator's primary goal was to observe the 'live' mediation, to learn about the process, and to help the lead mediator in any way the lead mediator required. Generally, this included administrative tasks. Parties were advised before the mediation that I would be attending as assistant mediator and external researcher.

<sup>19</sup> DEAN G. PRUITT & PETER J. CARNEVALE, *NEGOTIATION IN SOCIAL CONFLICT*, at xvi (Open Univ. Press, 1993).

<sup>20</sup> WILLIAMS, *supra* note 11, at 3.

as zero-sum games.<sup>21</sup> Gulliver, too, sees the role norms play in the negotiation arena: among other things, norms define the dispute that is subject to the negotiation, and parties' expectations and actions are constrained by that definition.<sup>22</sup> As such, it can be said that the negotiations take place within a particular normative order.<sup>23</sup>

### B. *The Phases Introduced*

For purposes of this study, the negotiation begins upon arrival at the arena established by the parties in advance of the negotiation session. It is recognized that the establishment of the arena may well involve negotiation and bargaining; however, this stage is not the subject of this analysis. Although some theorists describe the pre-negotiation activities as a phase to negotiation, the intent of this paper is to understand the mechanics of the interactions that occur during the actual negotiation session at which these interactions take place.<sup>24</sup> In addition, the ethnographic data regarding this preliminary phase is to a large extent unknown, with the exception of the known fact that the parties have agreed to have a mediation service provider administer the process, including organizing the dates and arena for the mediation.<sup>25</sup>

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<sup>21</sup> Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754, 766 (1983–1984); see also Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1978–1979).

<sup>22</sup> GULLIVER, *supra* note 5, at 193.

<sup>23</sup> The negotiations forming part of this study can be said to be positioned within a normative order. Negotiation is not isolated from the influences of such an order. See ROBERTS & PALMER, *supra* note 11, at 114; see also Debbie De Girolamo, *Seeking Negotiated Order Through Mediation: A Manifestation of Legal Culture?*, 5 J. OF COMP. L. 118 (2012); DAVID NELKEN, ED., *USING LEGAL CULTURE* 153 (Wildy, Simmonds & Hill, 2012).

<sup>24</sup> Most notably of the theorists, Gulliver describes phase one as establishing the arena for the negotiation. See GULLIVER, *supra* note 5, at 122–26. For other examples, see WILLIAMS, *supra* note 11, at 72–79; Zartman, *supra* note 11, at 96; Colleen M. Hancyz, *Strategic Negotiation: Moving Through the Stages*, in THE THEORY AND PRACTICE OF REPRESENTATIVE NEGOTIATION 67, 69–81 (Colleen M. Hancyz et al. eds., Emond Montgomery 2008).

<sup>25</sup> In this preliminary phase, negotiation of the dates, arena, and mediator selection is often required. This negotiation occurs either directly between the parties or their representatives, or through the mediation service provider's personnel. If the former, the ethnographic data is scarce as I was not present for those negotiations. If the latter, then the provider's personnel (sometimes, the author) was the intermediary who

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My observation of mediations suggests six distinct phases during which parties attempt to resolve their dispute. It must be remembered that these phases are examined in the context of the negotiation process, not the mediation process, despite the fact they occur during mediation. As a result, the case description and subsequent analysis do not focus on the presence of the third party intervener; instead, they focus on the negotiation process through which the parties move to reach agreement.

As stated above, the data suggests a processual framework comprising six stages: Unilateral Articulation of Positions, Information Exchange, Testing of Positions, Shift in Position, Bargaining Proposals, and Joint Decisionmaking for Final Agreement. Obviously, this last phase, Joint Decisionmaking for Final Agreement, is not reached where impasse remains and the parties do not reach consensus. Similar to the pre-negotiation activities, this analysis does not examine post-negotiation activities of the parties.<sup>26</sup> For purposes of this analysis, the negotiation ends when the parties leave the arena. Each of these phases will be discussed below.

### IV. THE SIX PHASES<sup>27</sup>

#### A. *Unilateral Articulation of Positions*

Invariably, the provider's mediators invite the parties to make a preliminary presentation of their positions. This is the first phase of the negotiation process; it begins the negotiation. The parties are insular—they think only of their own positions.

##### Case Study One: Personal Injury Negotiation—The Falling Crane

The Claimant, Henry Smith, was injured while performing his job. He was a photographer's assistant for a building supply magazine. He was on a construction site, holding large lights attached to the photographer's camera, when he and the photographer, Joe Austen, walked beneath the path of a building crane to photograph the crane for the magazine. While being lowered, a piece of the crane broke off and fell on Smith, breaking his back.

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communicated with the parties individually to determine preferences and organize the requirements for the mediation to take place, and therefore in those circumstances, some information is known.

<sup>26</sup> Also, as is the case with the pre-negotiation activities, the ethnographic data does not provide sufficient data to present a cogent articulation of events occurring post-negotiation.

<sup>27</sup> For the sake of anonymity, the names of the participants and selective details of the disputes in the case studies have been altered.

Smith sued his employer, the owner of the land on which the crane was situated, the owner of the crane, the photographer Austen, and a crane repair expert who supplied the crane and who was on site at the time of the injury, all for negligence. All parties were in attendance as were their legal representatives.

The parties entered an enormous boardroom for their first meeting. The room was awash in a sea of blue from all the lawyers' suits. Smith sat at the head of the room, clothed in grey and sitting in his wheelchair, flanked by his wife and his legal team.

The first articulation of position was by Smith's counsel. He began by referring to the fact that if the matter were not resolved, Smith would take the case to trial. He spoke of Smith's age and pointed to the fact that Smith had no choice but to follow Austen while Austen was photographing the crane. He referred to Austen's evidence. He said Smith was taken by surprise. Smith was forced to run with Austen; he was not told to stay back. He referred to the evidence regarding the moments before the crane collapsed; no one told Smith to stay back. The barrister then spoke of the legal responsibility of the various defendants: of the employer for failing to ensure a safe workplace and for being vicariously liable for the actions of Austen, one of its employees; of the owner of the land for failing to cordon off the area around the crane and for failure to warn of the danger; of the crane expert who failed to warn and exclude persons from the site; and of Austen who led Smith to danger as the person in charge of the shoot. He spoke of foreseeable risk, the danger associated with the site, and the failures of the defendants to prevent injury. In support of the position, some evidence was referred to. The barrister concluded by anticipating the positions of the defendants and categorically denying contributory negligence on the part of Smith.

The employer-defendant, Construction Enterprises, began through its barrister by offering statements of sympathy to Smith and a recognition that it was prepared to contribute to a settlement; however, only on the basis of a fair proportion of responsibility to be divided among the defendants and also Smith. Construction Enterprises made clear from the outset that contributory negligence was to be included in the determination of an appropriate outcome. The barrister then promptly denied Construction Enterprises was in fact the employer of Smith or Austen as alleged by Smith, however, the barrister did acknowledge a potential contractual obligation owed to them by Construction Enterprises. This was immediately followed by an articulation of the causes of the injury, laying blame on others including Smith: the area should have been cordoned off by the owner of the property to create a barrier to the crane as he invited the crane to be photographed and therefore



should have made the area safe for guests; the crane expert should have ensured the safety of the area and provided warnings of the danger as he ought to have known that the crane would break as it was being lowered; Austen should have seen the danger and should not have wandered beneath the crane; and due to the sheer folly of Smith walking beneath the crane when it was being lowered, Smith was contributorily negligent. For this argument, the barrister used the analogy of a tree being felled: no one would walk under a tree as it was being felled. As for Construction Enterprises' responsibility, it was so obvious that someone should not walk beneath the crane that there was no need to issue a warning. The barrister concluded by apportioning the responsibility as 15% to Smith, with the remaining 85% of the liability to be attributed to the owner of the land at 30%, Construction Enterprises at 10%, Austen at 20%, and the crane expert at 40%.

The owner of the land was next in the progression of the articulation of the positions. Again, through his barrister, he expressed his sympathies and acknowledged the horrific consequences that resulted from the accident before embarking on the reasons why he was not responsible for the injury. Three parties were responsible: Smith, Austen, and Construction Enterprises. Construction Enterprises had been given warnings and instructions it should have passed to its employees; Smith and Austen had heard these instructions; and it was self-evident that Smith and Austen should not have walked beneath the path of the crane, using the tree felling analogy introduced by Construction Enterprises. He said Smith was plainly foolish for walking under the crane and bears considerable responsibility. The owner of the land was responsible for taking reasonable steps to make the area reasonably safe, which it did by advising parties where to stand and by advising where the crane would be lowered. The barrister ended by stating he had not heard anything suggesting his client was liable.

The crane expert followed. He began also by expressing his sympathies for Smith and advised he would not repeat the allegations concerning Smith's liability. He described himself as having expertise with the crane and being a business associate of the landowner. He supplied the crane but had no further involvement with the crane nor had any responsibility. The landowner who owned the crane retained an experienced engineer who looked after the crane. The crane expert had no authority over visitors to the site. He was merely on the site to provide a piece of equipment at the request of the landowner. He was not in control of the operation. His view of liability, in descending order of apportionment, was as follows: (1) Construction Enterprises was primarily responsible as Smith was its employee and it was in charge of the shoot. It failed to conduct a risk assessment to ensure the safety of its workers. (2) The next party bearing responsibility was Austen

who was responsible for Smith. (3) Smith was contributorily negligent, but the crane expert declined to develop reasons for this view. (4) Finally, the remaining share of responsibility was on the landowner. However, if the crane expert were to be found liable, he would turn to his insurers who were made a party to the action and who were denying insurance coverage under the terms of an insurance policy.

Austen began in the same way as the others: he expressed his sympathy for Smith. He referred to the fact that Smith and he were cousins and that Smith had received an expression of regret from Austen directly, but it would be inappropriate not to echo the expressions of sympathy stated by the others. He began differently than the others, not referring immediately to his view of the liabilities, but rather to a need that the issue between the crane expert and his insurer be determined to provide certainty for the parties about the crane expert's liquidity and insurance status as it may impact Smith's willingness to accept an apportionment offered by the defendants. For Austen, the landowner was the principal villain as he had invited Construction Enterprises to photograph the crane and so it was incumbent on him to ensure everything was safe because he knew when the crane would be lowered and what was involved. There was plenty of time for warnings to be given. The landowner and crane expert should have warned them and there is no evidence that such warning was given. The barrister for Austen then went through the evidence in detail supporting Austen's position. He went on to stress the crane expert's responsibility for the crane: he should have ensured the crane worked safely, he knew what the dangers involved, and he should have taken precautions. Construction Enterprises was also responsible. It was responsible for the health and safety of all involved. As for Smith's case against Austen, Smith relied on the special relationship between them and on Austen for his safety. Austen pointed out that he was added as a party after the action commenced against the others. Until that point, Austen was going to testify in support of Smith. He pointed to the fact that they do not owe each other a duty of care beyond *Donoghue v. Stevenson*.<sup>28</sup> The analogy of the tree felling did not apply; rather, it was one of two adults holding hands crossing the street. Smith was responsible for his own safety.

The final defendant to speak was the crane expert's insurer. He too began by expressing sympathy for Smith. The barrister said he would not discuss insurance law. He did say that he did not know how anyone could say the crane expert had been in charge. It was the landowner who was in charge. Although having expressed sympathy for Smith, he then began to discuss Smith's conduct. He said the key point in the case on liability was the fact

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<sup>28</sup> *Donoghue v. Stevenson*, [1932] UKHL 100, [1932] AC 562.

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that Smith and Austen chose to walk under a crane being lowered. It was an insult to a man's intelligence to advise him not to walk under the crane in such circumstances and it was not because it was foreseeable that something would fall off the crane—it was foreseeable the crane itself could fall. It was complete folly to walk under the crane. The barrister denied that the dispute between the insurer and the crane expert needed to be resolved in order to resolve the claim. The insurer would not roll over. It was in an extremely strong position and was getting stronger as each party argued that the crane expert was in charge and was negligent because then it would become a case of late notification of the claim (which disentitles coverage). The insurer said the test in insurance cases is whether it was reasonable for the insured to believe the facts give rise to a claim: one cannot allege he is negligent and not know he was going to be sued. The insurer advised that it would not accept liability and the others should not view the crane expert as being insured. He had not heard anything to convince him otherwise.

Smith then personally spoke, referring to the fact that he had never spoken to such a large group of lawyers. He said the reason he walked under the crane was simple—there was no communication. If he had been told not to do it, he would not have done it. To the insurer, he advised that the insurance company put his family through hell; for three years, they have struggled. There is a need to put in place a fund for people like him who are suffering.<sup>29</sup>

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The parties articulate their opening positions which reflect their views about the strengths of their case and the weaknesses of the others'. There is legal posturing, high demands, and an emphasis on norms. The session tends to be competitive in terms of tactics and goals: parties seek to set the stage for a winner-take-all scenario.<sup>30</sup> Cognitive elements can be seen to be at play here including the illusion of superiority and optimism, overconfidence,

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<sup>29</sup> In this particular case, the standard paradigm is extended to include multi-party defendants. However, this does not substantively impact phase one. Each party begins the negotiation with an articulation of their position.

<sup>30</sup> The literature is laden with descriptions of the competitive, co-operative and problem-solving bargainer. For general discussion of these models see, ROBERTS & PALMER, *supra* note 11, at 134–42; Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 44–57 (1985); Menkel-Meadow, *supra* note 21, at 817–29; WILLIAMS, *supra* note 11, at 53–58 (discussing generally the models and descriptions of the competitive, co-operative, and the problem-solving bargainer).

escalation of commitment, and Pruitt and Carnevale's negotiation scripts involving assumptions made about appropriate negotiating behaviour.<sup>31</sup> The latter point is reflected in the expressions of sympathy for Smith preceding hard-hitting denials of liability by the parties.

Each party takes turns to set out why they are not responsible for the injury suffered by Smith. They speak of the law of negligence and in particular, issues of foreseeability and duties of care. They speak of the evidence of witnesses. They speak of the liabilities of others, but not of themselves. They are setting the stage here for the future discussions. With the exception of Construction Enterprises, which acknowledges it may have some responsibility, the others do not acknowledge any fault.<sup>32</sup> The statements begin with a human sentiment of sympathy, but these expressions of sympathy are quickly buried in statements about the folly of Smith walking under a crane being lowered. In this introductory phase, we see the emphasis on legal positions and the expression of norms: in the former, it is the law of negligence that figures prominently; with respect to the latter, it is the norm of common sense—do not walk beneath a crane being lowered.

There is a competitive approach taken in this first session by the parties: they insist they are not liable and therefore by implication, will not be contributing to any offer.<sup>33</sup> There is posturing, vigorous dissent, and self-interest at play throughout this initial phase. Essentially, the parties seek to improve their bargaining power by a show of strength. They seek to hide any weakness or show of weakness. However, one cannot say it is this competitive approach which defines the phase as suggested by Stevens nor does it assist in determining the bargaining range as characterized by Stenelo and Douglas.<sup>34</sup> The parties, excepting Construction Enterprises, are at zero in terms of their willingness to accept responsibility. No bargaining range can be ascertained at this time unless one defines bargaining range as including

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<sup>31</sup> See MAX H. BAZERMAN & MARGARET A. NEALE, *NEGOTIATING RATIONALLY* 2, 9–11, 56–61 (The Free Press 1993) with respect to escalation of commitment, overconfidence, and illusions of superiority and optimism; see PRUITT & CARNEVALE, *supra* note 19, at 89 regarding negotiation scripts.

<sup>32</sup> When seen in context, this acknowledgment is not surprising. Construction Enterprises was a corporate entity with a public profile. It was also the party with the deepest pockets, and it suggested some potential contractual obligation to Smith and Austen.

<sup>33</sup> See, *supra* note 30.

<sup>34</sup> See generally STEVENS, *supra* note 8, at 10–11, 57–96; STENELO, *supra* note 9, at 91–101; and Douglas, *supra* note 10, at 72–73 (discussing the competitive tactics and characteristics of litigators during the first session of a negotiation).

the implicit understanding that there needs to be movement for agreement.<sup>35</sup> That is not being suggested here.

As for Gulliver's developmental model, one could argue that elements of Gulliver's phase two, Composition of Agenda and Definition of Issues, are evident.<sup>36</sup> The parties in the case may have been defining issues—for example, the extent to which the crane falling was foreseeable and also the contributory negligence of Smith. The defining of issues, however, is not the primary aim of the phase here; rather, it is the articulation of the legal position and goal of establishing strength of conviction. This appears to overlap with Gulliver's third phase of Establishing Maximal Limits to Issues in Dispute during which expressions of strength are made and social, moral, and personal faults of the others are expressed while promoting one's own faultless position.<sup>37</sup> There is a great divide between the parties which is illuminated during this initial phase as suggested by Douglas and Gulliver.<sup>38</sup> There appears to be no possibility for agreement as the parties seem to be entrenched in their respective positions.<sup>39</sup> Williams' characterization of the first phase of Orientation and Positioning is also relevant here.<sup>40</sup> Lawyers for the parties are communicating their client's opening positions through a competitive orientation to establish their positions as forcefully as they can.

This case provides a typical example of the first phase of the process, with its elements easily discernible. It should be noted, however, that the first phase may not always happen in the way it appears in this case; that is, in a sequential manner whereby each party takes turns to articulate their position. Although it generally occurs in this way, upon occasion, it involves banter of position statements, moving from point to point, party to party. No matter what the form, the outcome is the same. Parties state their positions, focusing on rules and norms. This introductory phase sets the stage for the next phase, Information Exchange.<sup>41</sup>

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<sup>35</sup> Douglas, *supra* note 10, at 73.

<sup>36</sup> GULLIVER, *supra* note 5, at 126–35.

<sup>37</sup> *Id.* at 135–41.

<sup>38</sup> Douglas, *supra* note 10, at 72–73; GULLIVER, *supra* note 5, at 137–39.

<sup>39</sup> In fact, no agreement was reached in this negotiation; however, this does not detract from the example because this exchange is a common feature of the negotiations observed.

<sup>40</sup> WILLIAMS, *supra* note 11, at 79–81.

<sup>41</sup> Some may say that the first phase is also about information exchange. However, there is a distinction. Phase one articulates that which the parties know already. It repeats the way in which they approach the dispute in the legal arena of the civil dispute.

## B. Information Exchange

During the information exchange phase, the parties disclose facts they believe are important for the furtherance of their position. They are clarifying their positions.

### Case Study Two: Nuisance Claim—The Showering Softballs<sup>42</sup>

The parties here are a residential landowner and the owners of a softball association whose pitches were located adjacent to the residential landowner's property. The landowner, Marshall Hall, brought action against Maple Leaf Softball Association in nuisance for the invasion of his property by softballs. Both parties were represented by legal advisers. The Association's softball pitches and practice areas had been built a number of years prior on land that had been owned by Hall. Hall sold the land to the Association, knowing that softball pitches would be built on the land. After several years of living adjacent to the pitches, Hall made the allegation that the Association had changed the Association's original plan of development for the land, creating a nuisance as a result. Softballs were damaging his property and were a danger to his family. Hall was now looking to sell his remaining land to a developer for the construction of a large commercial complex. He said the continuing nuisance was a barrier to the sale and development of his land.

The parties gathered at the Association's Club House. The joint meeting room was the Members Lounge with vistas of the pitches. The private party meeting rooms were separated by a long corridor: the room housing Hall was dark and somber whereas the Association Team sat in the Manager's office with its windows and impression of administrative productivity.

The parties set out their positions: Hall discussed the impact of the flying softballs on his property and the improper action of the Association. The Association stated that the softball situation was foreseeable when Hall sold his land for the development of the pitches, that it had a good defence in contract, and that it would not need to pay for the increasing litigation costs if the matter went to trial.

Once each had the opportunity to articulate their position, they began to discuss the facts of the dispute. This occurred with the parties directly in a brief session immediately following the articulation of their positions. It then occurred through the mediator in separate private meetings. During the face-

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<sup>42</sup> A much longer and detailed version of this case is the subject of exploration in De Girolamo, *supra* note 23 through which the relationship between law and mediation as a social process was examined for its relevance to the conceptualization of legal culture.

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to-face discussion, the parties discussed the events leading to the original sale of the land by Hall to the Association; in particular, they discussed the planning approval for the softball site, when it was approved, and by whom. The Association's information was that Hall obtained the approval and sold the land with the planning approval. The purchase of additional property was also discussed and amendment to planning approval as a result. Hall also raised the issue that a potential solution had been proposed by Hall—that of a netted structure to be placed around the property boundaries.

The next sessions of information exchange occurred through the mediator where each party discussed their view of the case. Hall spoke of the history of the softball site, the Association's objection to Hall's current Planning Act application for approval of the large commercial development on Hall's current property due to safety concerns over flying softballs, the planning approval history for the softball site, the refusal of the Association to deal with either the problem or Hall, his attempts to deal with the problem, and the potential steps that could be taken to deal with the problem.

The exchange of information continued with the Association Team and the mediator. The discussion centered around the planning approval process, the extent to which softballs landed on Hall's property, the ability of the Association to deal with other neighbors living adjacent to the site, the steps already taken to prevent the softballs from hitting Hall's land, the potential new steps that could be taken, and the Association's own concerns over the intended development of Hall's property into a commercial building site.

The information exchange ended with a site visit to the pitches and practice areas during which both parties pointed out the origin of the softballs from the site and the path of the softballs over to Hall's land. Hall pointed out where the commercial development would be, where the new buildings would be located on his land, and where the softballs have landed on his property. The Association advised of the hitting areas and the pattern of the hill and ditch existing between the properties, which had been planted with trees to create a barrier between the properties.

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In this second stage of the process, there is a focus on the facts of the dispute and evidentiary concerns. This differs from the first phase when there is more emphasis on the articulation of norms and rules supporting the positions. Here, the parties discuss facts and express what they believe is an appropriate way to resolve the dispute. They are not willing at this stage to accept another view of the facts, be influenced by their opponent's case, or to consider possible alternate ways to deal with the dispute other than their own

stated options. Again, they appear to be overconfident of their positions. They use this phase to strengthen their bargaining position, hoping to influence the other party as to the merits of their view.

Strategically, they maintain vigorous opposition to their opponent's position and make vigorous statements of their own position. The parties are selective in the information they disclose; much of it is disclosed to support their position. Cognitively, they struggle with the same barriers as existed in phase one—that of overconfidence as well as a sense of superiority and optimism.<sup>43</sup> In addition, there is reliance on readily available information and a failure to look at matters from the opponent's perspective.<sup>44</sup> Wolfe's 'equity seeking' is also evident: Hall wanted an acknowledgement of his suffering over the years.<sup>45</sup> All of this serves to support the competitive tactics used during the phase.

This phase has no similarity in the Stevens, Stenelo, Douglas or Williams models, but some congruency in Gulliver's phase three, "Establishing Maximal Limits to Issues in Dispute" where he says that the phase is marked by "shows of strength and suggestions or forthright assertions of resoluteness and threat."<sup>46</sup> The difference may be in the aims of the phase: Gulliver says his phase is to determine where to set initial demands; here, the aim is to continue to strengthen bargaining power for later stages when proposals are suggested and tested.<sup>47</sup> The parties seek to lay what appears to be the defensive groundwork for the later stages in the negotiation where they will need to shift their positions if they are to achieve agreement. In other words, they are not so concerned to persuade the other to move than to defend against movement. It appears to be a phase in which the parties seek to establish their firmness of position and reticence of retreat.

### C. Testing of Positions

The purpose of this phase is to establish the strengths and weaknesses of each case. By doing so, the parties determine where to place their first offer.

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<sup>43</sup> Bazerman & Neale, *supra* note 31, at 2, 60–61; Margaret A. Neale & Max H. Bazerman, *Negotiator Cognition and Rationality: A Behavioral Decision Theory Perspective*, 51 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 157, 160 (1992).

<sup>44</sup> PRUITT & CARNEVALE, *supra* note 19, at 85–88, 90–99.

<sup>45</sup> P.Y. Wolfe, *How a Mediator Enhances the Negotiation Process*, 46 N. H. BUS. J. 38 44 (2005).

<sup>46</sup> GULLIVER, *supra* note 5, at 137.

<sup>47</sup> *Id.* at 137–38.



Case Study Three: The Services Contract—Website Malfunction

Entertainment Inc. is a website-based entertainment business with a turnover of £50 million per year. It sold theatre, film, concert, day trips, and exhibition tickets through its website. In 2005, it contracted with IT Developer Inc. for the development of a new website for its business. The contract price was £2 million. Entertainment alleged that the website was defective and failed to provide what was contracted for. It further alleged that IT Developer's response was inadequate and so took steps to correct the deficiencies. As a result of IT Developer's breaches under the contract for the development and installation of a new website, Entertainment alleged that it sustained damages of £8 million. IT Developer defended on the basis that it provided the proper system and that Entertainment accepted the system upon its completion. It alleged that any deficiencies in the system lay at the feet of Entertainment for hiring staff unskilled in the use of the system. Furthermore, it did not advise IT Developer of the specific alleged deficiencies nor give IT Developer an opportunity to correct any deficiencies.

The fifth floor of the mediator's office provided the forum for this negotiation, with its friendly reception team welcoming the parties and ensuring they were well taken care of. The parties were cordial and friendly during their initial meeting.

Once positions were articulated and information exchanged, the parties were tested on their positions. This was done directly between the parties and through the mediator. Entertainment was tested on its view that it was the David of the David and Goliath situation posed by this dispute. In other words, it was tested on its business position and its ability to deal appropriately with the website given the lack of skill of its employees. It was also questioned about its decision to scrap the website developed by IT Developer eighteen months after its installation and about the benefit it received from the website during the eighteen-month period. Entertainment was also questioned about its assertion that its team was able to rebuild the website within a three-month period, the fact that it rebuilt the website without giving IT Developer an opportunity to remedy the defects, and the fact that the damages could be limited to the cost of the rebuild. Difficulties with its loss of profit claim were made clear as was the fact that IT Developer would not agree to pay £8 million that Entertainment was seeking in compensation.

As for IT Developer, the value received for payment made was questioned. It was also made clear to IT Developer that Entertainment would not accept the token payment that IT Developer was inclined to offer on the basis of its view of the strength of its position and which it maintained throughout the negotiation thus far. It was reminded that Entertainment spent

£2 million for a system it was no longer using. It was also reminded that IT Developer had acknowledged there had been some difficulties with the system, albeit minor difficulties. The value of the system needed to be considered by IT Developer, which it was failing to do. IT Developer was also challenged on its intent to calculate any compensation as a proportion of the profits it made from the contract with Entertainment. Throughout the testing of IT Developer, IT Developer threatened to cease the negotiations if Entertainment did not alter its view of its case.

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The strengths of positions are tested in this phase. To a certain extent, this phase may be similar to Williams' second phase of argumentation where he says that the parties work to reduce the distance between them or to Douglas' second stage of 'reconnoitering the range' where the parties seek to establish a bargaining range.<sup>48</sup> The parties reduce the distance not by numbers, but by trying to undermine the other's confidence in their own case. As for establishing the bargaining range, they do so in their attempts to lower the expectations of their opponent's desired outcome and to increase the expectation of their opponent's view of *their* desired outcome. This stage continues to fall within Gulliver's stage three, Establishing Maximal Limits to Issues in Dispute.<sup>49</sup> Parties are continuing to thrust and parry what they perceive to be strong positions. They have not yet begun to consider real potential outcomes. It is not until the movement into the next phase that shifts in positions occur.

The strategies used in this example include reliance on evidentiary issues relating to the proof of the positions, discussion of legal obligations and remedies, threats, and firm articulation of views and opinions regarding the merits of positions. These strategies continue to be of the same character as those used in phases one and two. Essentially, the parties engage in strategic distributive conduct: the unwillingness to accede to any form of compromise, the demand for unilateral concessions, the unrelenting hold on a positive view of one's case with the accompanying denial of weakness in any form, and the need to ensure that the pie is divided unequally—more for one than the other.<sup>50</sup> Within this phase, the escalation of commitment occurs to create a cognitive barrier when Entertainment made clear that it would not accept a token payment. Another example of such a barrier is in the inability of both

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<sup>48</sup> WILLIAMS, *supra* note 11, at 79–81; Douglas, *supra* note 10, at 73–75.

<sup>49</sup> GULLIVER, *supra* note 5, at 135–41.

<sup>50</sup> See, *supra* note 30.

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parties to see the other's perspective: for example, from Entertainment's perspective, the payment of £2 million for a system that did not provide the expected service, and from IT Developer's perspective, the lack of opportunity to correct the defect.

### *D. Shift in Position*

Critical to the negotiation process is the change that occurs to a party's self-assessment of its position. The move into the bargaining phase of negotiation demands this change. Given its ethereal quality, this shift in position is subtle and difficult to illustrate through case study analysis. However challenging, an attempt is made here.

#### Case Study Four: Management Services Contract—Unpaid Invoices

Personnel Inc. provided management personnel and other services to North Hill Limited from time to time under a project-based service contract. The parties had worked with each other over the course of several projects. Terry Smith had been an employee of Personnel and the project manager for the particular project at issue, but subsequently left its employ to become North Hill's employee. At the time of the negotiation, Smith was no longer employed by North Hill, but continued to provide services to North Hill through a consultancy agreement. It was implied by North Hill that his evidence would support North Hill's defense.

The issue in dispute related to unpaid invoices. Personnel alleged an oral agreement had been entered into for the services of four employees at a set fee of £1,000 per day. Personnel alleged those services were to be provided from March. During the same meeting at which the fee was established for the employees, it was also discussed that Personnel would provide an assessment evaluation service for North Hill's administrative operations at a fee of £200,000. North Hill contended that the fees for the four employees were included in the £200,000 fee for the assessment evaluation service, and accordingly did not pay invoices submitted by Personnel in respect of the employee fees of £1,000 per day. Personnel commenced action against North Hill for payment of outstanding invoices.

The negotiation took place in the skyscraper offices of North Hill Limited. Meeting rooms were separated by employee workstations. The North Hill Room was small and required a key to enter. Personnel's representative was given a room with magnificent views of the London skyline. Personnel's CEO, Harry Johns, was in attendance for Personnel. Smith, together with a senior management employee, Joe Picton, was in attendance for North Hill.

After articulation of their positions, the parties exchanged information about the calculation of the invoice fee, the basis on which North Hill refused to pay the invoices at the fee charged, North Hill's calculation of fees owed, the documentary evidence relied upon by each party, the persons involved in the project, the nature of the services provided by Personnel, the circumstances surrounding the project for the assessment evaluation services, and the actual services provided to North Hill.

Testing of the positions began with North Hill being challenged on two documents: one which referred to a discussion between the parties regarding the fee to be charged for the assessment evaluation service (it was initially proposed to be £180,000 and was later changed to £200,000); and a second document which set out Smith's request for the payment of £4,000 in respect of one of the employees (which supported the fact that the invoice for this employee was not part of the £200,000, but was a separate fee for separate services).

The testing continued with Personnel when it was pressed for documents to establish the hours worked by the four employees.

North Hill was then challenged further on the fact that the invoices were provided for each month of March, April, May, and June at £1,000 per day for the employees. When questioned as to what was done with the invoices upon receipt, North Hill could not respond. Discussion also occurred about the inability of North Hill to rely on the evidence of Gus St. Clair, its representative at the first meeting between the parties who was no longer able to testify. North Hill was also referred to a letter of intent with respect to the £200,000 assessment evaluation services—how could North Hill believe the invoices it received for four months prior to receipt of the letter of intent were included in the £200,000 fee? The letter of intent was discussed at a meeting in July, and it set out deliverables for the assessment evaluation service at a proposed fee of £180,000. Neither party had produced anything in respect of that service prior to the letter of intent. The decision to charge £200,000 was determined in the following month, and a start date was established for the project.

Furthermore, North Hill was reminded that Terry Smith had raised a concern in March that four employees were being supplied to North Hill without the authorization of North Hill's Board of Directors (authorization of the expenditure was required), and that authorization was subsequently granted in August. It was reiterated to North Hill that it knew Smith had wanted four employees to provide services to North Hill and that North Hill had agreed to his request. At that point, North Hill's legal adviser said, "Thank you for helping me with their position. I need to speak with my

client. There is some scope for settlement.” When the negotiation resumed, North Hill proposed an initial offer and the bargaining began.

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Douglas states the movement from her first phase where parties are working to establish a bargaining range to her second phase where parties are seeking to determine the range is difficult to distinguish because it is in the latter phase that judgments are made about the opponent’s position and mutual willingness to move from stated positions.<sup>51</sup> The same subtlety is found here, with the data suggesting a shift occurring as a result of what has gone on in the process until this stage.<sup>52</sup> Druckman, in an exploration of turning points in international negotiation, sees the concept to be embedded within the chronology of a negotiation as an event indicating movement from one phase in the negotiation to another.<sup>53</sup> While it may be suggested the shift in position is then not a separate phase in the negotiation process, but rather the result of the challenges made to the parties’ positions, the data suggests otherwise. There is an intermediate step between phase three and phase five: the movement by the parties to begin to formulate, articulate, and respond to bargaining proposals follows a change that occurs within the parties’

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<sup>51</sup> Douglas, *supra* note 10, at 73–80.

<sup>52</sup> ‘Turning points’ in negotiation have been considered in other contexts: *see, e.g.*, Sara Cobb, *A Developmental Approach to Turning Points: ‘Irony’ as an Ethics for Negotiation Pragmatics*, 11 HARV. NEGOT. L. REV. 147 (2006); Daniel Druckman et al., *Interpretive Filters: Social Cognition and the Impact of Turning Points in Negotiation*, 25 NEGOT. J. 13 (2009). These two studies acknowledge turning points as events that change the course of negotiation and explore their occurrence in relation to discourse analysis and social cognitive influences. Further still, the concept as a critical moment in negotiation has been explored. Transformations, moves and turns in social positioning, and out-of-keeping acts are all seen as critical moments altering the direction of the negotiation: *see, e.g.*, Deborah M. Kolb, *Staying in the Game or Changing It: An Analysis of Moves and Turns in Negotiation*, 20 NEGOT. J. 253 (2004); Kathleen L. McGinn et al., *Transitions through Out-of-Keeping Acts*, 20 NEGOT. J. 171 (2004); Linda L. Putnam, *Transformations and Critical Moments in Negotiations*, 20 NEGOT. J. 275 (2004). Gillian M. Green & Michael Wheeler, *Awareness and Action in Critical Moments*, 20 NEGOT. J. 349 (2004) say that critical moments must be recognizable during a negotiation and Carrie Menkel-Meadow ruminates over their importance for negotiation research in *Critical Moments in Negotiation: Implications for Research, Pedagogy, and Practice*, 20 NEGOT. J. 341 (2004). While I am not advocating the shift to be a critical moment in the sense as suggested by these scholars, it is a critical moment in the sense that the shift is needed for the negotiators to begin bargaining as described above.

<sup>53</sup> Daniel Druckman, *Turning Points in International Negotiation: A Comparative Analysis*, 45 J. OF CONFLICT RESOL. 519, 520 (2001).

assessments of their positions. This stage must occur before bargaining is contemplated.

The shift may come, as Gulliver suggests, as a result of information exchange and learning.<sup>54</sup> The parties have disclosed information about their position and have heard the articulation of the opponent's position. They have had both an opportunity to air their views and to receive information. They have been tested on the disclosure and their positions. They have learned about the dispute. Gulliver suggests the cyclical exchange of information and learning leads to change and ultimately may avoid the necessity of bargaining.<sup>55</sup> While it is not advocated here that bargaining is avoided as a result of the information exchange (and indeed, the data does not support Gulliver's hypothesis in this regard), the information exchange and learning that takes place in the first three phases of the negotiation process prepares the parties to undergo a shift in judgment and negotiation behaviour. The shift leads parties to embark on a consideration of bargaining proposals, which forms part of a new stage in the process.

Although it is not always discernible as to when the shift occurs, the case study seeks to illuminate the subtlety. There is no one word that is exchanged, no one statement made, no movement of arms, no flapping of feet to signify when the change occurs. The shift is a culminating event, one that may take parties by surprise and surreptitiously lead them to the offer and counteroffer dance of bargaining proposals or one that occurs as a result of the rational assessment of information disclosed during the course of the process thus far.

This case study appears to fall into the latter category. We see that a change occurs after North Hill has articulated its position at the outset of the negotiation, has provided information to Personnel, has received information in turn, and has been tested on its position by both Personnel and the mediator. Something occurs to propel North Hill to initiate bargaining by making an initial offer. The actual cause of the event is known only to the party as it occurs within the privacy of its own internal deliberations. Suffice it to say, however it occurs, it occurs. It is an integral part of the negotiation process. Without this shift, the parties would not move from stated positions to bargaining. Some may liken this shift to a movement from a competitive strategic approach emphasizing self-interest to a cooperative one where compromises are sought by each party in their attempt to resolve the

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<sup>54</sup> See generally the discussion about the cyclical process of information exchange and learning in GULLIVER, *supra* note 5, at 83–120.

<sup>55</sup> *Id.* at 71.

dispute.<sup>56</sup> Alternatively, it may be seen as an instance where cognitive influences are at their lowest impact.

This shift in position needs to be experienced by only one of the parties before bargaining begins. It is what commences the bargaining. Here it is North Hill who makes the shift and opens the doors for settlement proposals. Personnel undergoes its own shift in the context of bargaining through its responses to North Hill's offers and its counteroffers to North Hill.

### *E. Bargaining Proposals*

At this stage, the parties are concerned with movement: they seek movement from the other and they consider the extent to which they are prepared to move in order to reach a solution. Concessions and compromise occur, alternatives are considered, a viable range is established, trading on issues is determined, and exchanges of proposals are made.

#### Case Study Five: Corporate Liquidation—Shareholder Conduct

This case was about the action taken by a shareholder of a company that went into bankruptcy. The liquidator of the company, the Trustee, brought action against the company's former shareholder for allegedly removing £150,000 from the company accounts. The company ultimately filed for bankruptcy and by the time of the liquidation, had a £83,000 deficiency. The Shareholder denied the allegation stating the funds were removed to pursue new business opportunities for the company.

The parties were represented by lawyers. The negotiation was held at the offices of the Shareholder's solicitor. The Shareholder and his legal team were housed in a bright and spacious boardroom. The Trustee and his solicitor were given the stock room.

It became clear soon into the negotiation that the central issue in the negotiation was the status of the original offer made by the Trustee early in the dispute. The Shareholder fixated on the offer which became the foundation for his position. The fact that money had been taken from the company seemed to be a non-issue: the issue was how much would the Shareholder pay to the Trustee.

The Shareholder tested the position of the Trustee by referring to the initial offer made by the Trustee for payment by the Shareholder of £50,000. The Shareholder alleged he had accepted the offer, but the Trustee had

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<sup>56</sup> Stevens would suggest that this results in a new phase of the negotiation, one which moves from competitive strategies to co-operative strategies: STEVENS, *supra* note 8, at 10–11, 57–121.

ignored his acceptance and instead raised the offer to £72,000, which was the revised value of the company deficiency at liquidation. The Shareholder invoked that initial offer and challenged the Trustee on it.<sup>57</sup> During the testing period (carried out by the mediator), the Trustee was challenged about its actions surrounding the withdrawal of the offer in the face of what appeared to be an acceptance by the Shareholder. Discussion of the legal status of the offer and acceptance occurred, as did the ability of the Shareholder to pay. The Trustee was adamant that the original offers made early in the dispute were not relevant and that in the current negotiation, it was seeking payment of £95,000 from the Shareholder. The Trustee continued to be tested on this position. Its subsequent agreement to compromise on this position and make an offer of £75,000 began the exchange of bargaining proposals.

The Shareholder was advised of the offer and was also advised that the Trustee had been firmly entrenched in the higher number of £95,000 but had been challenged to reduce the number. The Shareholder was concerned about the ability to pay the amount and raised the need for delayed payment terms. There was discussion about the value of real property against which funding could be obtained. The Shareholder's counsel mused whether the drop from £175,000 to £75,000 in the Trustee's claim was a sign of its belief that its case was weak or whether it was in sympathy for the Shareholder. After some discussion, he wondered again whether it was because the Trustee was not as confident in its position as it had been at the beginning of the negotiation.

After some deliberation, the Shareholder counteroffered at £64,000 to be paid within a period of eight weeks to permit mortgage funding, with interest payable on the sum at the standard variable rate. The amount was inclusive of costs.

The Trustee was informed about the counterproposal. Its legal adviser suggested that the parties split the difference between the two offers with the Shareholder paying £70,000 and each party bearing its own costs. The Trustee wanted security for the payment in the form of a personal undertaking from the Shareholder. After some deliberation, the Trustee agreed that the offer suggested by its legal adviser be conveyed to the Shareholder.

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<sup>57</sup> One may argue that bargaining had begun with this initial offer by the Shareholder. However, the data suggests otherwise. As will be noted, there was much discussion with the Trustee about the history of the offers, and the status of its original £50,000 offer. Bargaining did not begin until the parties were within what STEVENS, *supra* note 8, at 10–11, 97 and STENELO, *supra* note 9, at 101–06 refer to as the contract zone.



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The Shareholder was told that the Trustee's approach was to split the difference and was told of the need for the undertaking. He was also informed that if the Shareholder counteroffered at £69,000, the Trustee would go to trial. The Shareholder agreed to pay £70,000 but needed to discuss the terms of the security requested by the Trustee.

At that point, the solicitors for both parties met to discuss the security to be offered by the Shareholder for the payment. The Trustee wanted a charge on real property owned by the Shareholder. The Shareholder was against this because it would preclude the Shareholder from mortgaging the property further without the consent of his partner. The Trustee offered to refrain from registering the mortgage. The Shareholder suggested an equitable charge. The Trustee then suggested a judgment debt in the form of a Tomlin Order which could be enforced as a judgment if the payment were not made.<sup>58</sup> The Shareholder agreed and an agreement in principle was reached.

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This phase sees a shift from the competitive mode of the prior phases to a seemingly more cooperative approach as the parties seek to find an acceptable outcome. The bargaining proposals occur only after (i) the parties have made clear to their opponent their position and the firmness with which they believe in the strength of their position; (ii) parties have engaged in information exchange about their positions; (iii) they have been challenged about the strength and merit of their position; and (iv) a position shift occurs. In this case, the parties went through these stages to enter into the penultimate stage of the process: the exchange of offers and counteroffers. During this phase, the bargaining range is established and determined. The Trustee's first opening bid of £75,000 anchored the range, with the Shareholder's proposal of £64,000 setting the range.<sup>59</sup> There was an attempt by the Trustee to anchor the first offer at the much higher figure of £95,000

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<sup>58</sup> A Tomlin Order under The Civil Procedure Rules, 1998 SI 1998/3132 for England and Wales is a form of consent order staying proceedings on terms, also allowing parties to apply to the court for enforcement of the consent agreement without the need to initiate new proceedings. See, e.g., *Model Settlement Agreement & Tomlin Order*, CENTER FOR EFFECTIVE DISPUTE RESOLUTION, available at [http://www.cedr.com/library/documents/settlement\\_agreement.pdf](http://www.cedr.com/library/documents/settlement_agreement.pdf) (last visited June 22, 2012).

<sup>59</sup> You will note that the Shareholder's opening position of £50,000 is not considered as part of the bargaining proposal. It was a test by the Shareholder, an attempt to anchor the range as low to zero as possible. The data suggests that the Shareholder did not expect the Trustee to accept the offer, nor be persuaded by it. It seemed to be a tactical move to undermine the Trustee's confidence in its case.

without regard to the history of the prior exchange between the parties. The Trustee was, however, persuaded to reduce the figure and thereby take the first step to establishing a contract zone.

During this stage, parties reevaluate their expectations, they assess their opponents' expectations, they speculate on the possible reactions to their offers, they formulate offers within the contract zone, and they postulate reasons why their offer merits acceptance. This phase appears to be a combination of three of Gulliver's phases: Narrowing the Difference, Preliminaries to Final Bargaining, and Final Bargaining.<sup>60</sup>

The difficulty of the phase, as many of the theorists state, is to know when the offer on the table is the final and best offer that will be made. For example, for Douglas, this represents the last stage of the negotiation process: it is during the final stage that parties need to decide whether the final offer is on the table.<sup>61</sup> Schelling refers to this period of bargaining as "pure bargaining." Concessions occur, according to Schelling, because one party believes the other will not concede further, and therefore, he must concede if he wants to reach agreement. As Schelling states:

"I must concede because he won't. He won't because he thinks I will. He thinks I will because he thinks I think he thinks so. . . ." There is some range of alternative outcomes in which any point is better for both sides than no agreement at all. To insist on any such point is pure bargaining, since one always would take less rather than reach no agreement at all, and since one always can recede if retreat proves necessary to agreement. Yet if both parties are aware of the limits to this range, any outcome is a point from which at least one party would have been willing to retreat and the other knows it! There is no resting place.<sup>62</sup>

Stevens says this is pure bargaining because

any such outcome is a position from which at least one party would be willing to retreat for the sake of agreement, and this the other party knows. In such a situation, to insist upon any position other than that most favored by one's opponent is "pure" bargaining in the sense that one would retreat if this were necessary to agreement.<sup>63</sup>

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<sup>60</sup> GULLIVER, *supra* note 5, at 141–68.

<sup>61</sup> Douglas, *supra* note 10, at 80–81.

<sup>62</sup> THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 22 (Harvard University Press 1980).

<sup>63</sup> STEVENS, *supra* note 8, at 108.

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According to Stevens, Schelling says the reason why a party will concede is the belief that the other will not and therefore to get to agreement requires the party's concession.<sup>64</sup>

The data supports the Schelling model of pure bargaining: at some point in the negotiation the judgment must be made. Will my opponent concede further? If not, will I concede further for the sake of agreement? Another observation arising is that, generally, once the parties are in the bargaining phase of the process and have established the contract zone, a settlement will more than likely occur. It seems that if the parties have worked through the prior phases of the negotiation and have managed to establish a contract zone without a party walking away from the negotiation table, the negotiation will reach agreement. This usually occurs in this phase; however, it may also occur earlier in the process. It is a moment in time and space when it is clear that one or both of the parties have understood what the dispute involves and that a settlement must be reached. It is when parties are prepared to coordinate their efforts to move toward agreement. Certainly in the bargaining phase, the parties move closer to each other's position, and sometimes, to the observer, the amount at which settlement will occur can be gleaned.<sup>65</sup>

While it could be said that the parties are engaged in a coordinated effort to reach resolution, they also continue to engage in some competitive moves such as bluffing, threatening, and vigorous posturing in a bid to reduce the expectations of the other party. Indeed, the data suggests that even in their coordinated effort to reach agreement, their strategic approach remains highly competitive. The parties are balancing between two goals: to maintain bargaining strength and to reach agreement. On the one hand, in seeking agreement, they desire the most advantageous bargain they can get and in this way they are at odds with each other. On the other, they both realize there must be compromise to reach agreement. They struggle to manipulate who will compromise and by how much. They attempt to minimize their movements while demanding large concessions from their opponents.

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<sup>64</sup> *Id.*

<sup>65</sup> During the observations of the process, the mediator and I would often make a non-monetary "wager" as to the amount at which a matter would be settled or the amount at which the first offer or counterproposal would be set. More often than not, our estimates were accurate. Schelling refers to this when examining bargaining power and skill: He queries whether bargaining power or skill is relevant when predictions of outcome can be made accurately. See SCHELLING, *supra* note 62, at 68–69. Menkel-Meadow, *supra* note 4, at 377, says the data of observed mediations suggests negotiators expect to compromise their claims in the middle of their two competing claims.

*F. Joint Decisionmaking for Final Agreement*

An agreement in principle is reached. The negotiation, however, continues as the parties work together to finalize the details of the agreement and to formalize its content in a signed settlement agreement.

Case Study Six: Employment Dispute—The Disabled Worker

Lucy Shelley had been employed by a large corporation. She commenced a claim against her former employer alleging she was discriminated against by reason of disability. She alleged that her performance, which had been highly rated, was rated poorly upon disclosure of her disability status, and that the company subsequently embarked on a course of conduct which resulted in Shelley's exclusion from participating in certain corporate events including career advancement opportunities. The company, Riverdale Holdings, vigorously defended against the allegations of discrimination and particularly, Shelley's damages claim for payment of a lifetime of income compensation she alleged she lost by reason of Riverdale's actions.

Both parties were represented by solicitors, and both parties actively participated in the negotiation together with their solicitors. The negotiation took place at the offices of the solicitors for Riverdale. Boardrooms were large, refreshments plentiful, and pens and pencils with the law firm's logo were available for the taking. This final phase of negotiation took place very late in the evening following a full day of mediation.

The parties agreed to a principal payment of £400,000 to be allocated in a tax efficient manner, outplacement services and training, a letter of reference, and payment of the mediation costs. Once the agreement in principle was reached, the parties then embarked on fine-tuning the provisions. For example, there was discussion and negotiation on the tax aspect of the payment. There was a suggestion of splitting the payments into a payment for injury to personal feeling. Shelley wanted £50,000 to be tax-free and £30,000 to be apportioned to personal feelings. Riverdale was fine with the £50,000 tax-free payment but argued that the personal feeling allocation should be limited to £7,500. Shelley pointed out that the company had said it would make the payment in the most tax efficient way. Riverdale retorted it was subject to reasonableness. Shelley then suggested apportioning the payment to personal injury. Riverdale said the tax rules did not permit such an apportionment, however, it would consider other suggestions by Shelley. On further consideration, Riverdale was willing to apportion £10,000 to personal feeling but nothing to personal injury because it was taxable as relating to employment. Shelley suggested £20,000 to

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personal injury subject to providing an indemnity to Riverdale in the event the tax authorities found the payment to be taxable and penalized Riverdale. Riverdale refused on the basis that the payment was taxable and it was not willing to avoid tax on it.

While this negotiation over the apportionment of the payment for tax efficiency was ongoing, the Riverdale legal team continued drafting the agreement with review by Shelley's legal adviser. Some discussion also occurred relating to the payment date.

Another issue that arose dealt with the payment of legal costs. In Riverdale's view, the payment of legal fees was included in the overall payment of £400,000. For Shelley, the legal fees were a separate item and formed part of the agreement in principle. Miscommunication was responsible for the misunderstanding. The parties became upset over the miscommunication and each party appeared to be adamant as to their position. Shelley threatened to walk away from the negotiation if the legal fees were not paid. Riverdale said it had no more money to offer. Recriminations about each other's conduct were made. For a moment, there was a question as to whether the parties could continue to move toward agreement. In an effort to resolve the issue, the parties embarked on further bargaining over this issue, suggesting trade offs of legal fees against an increase in the amount to be allocated to personal feeling. In the end, the parties each made some movement: Shelley reduced her claim for legal costs by £2,000 and Riverdale agreed to pay £6,000. A compromise was reached through concession making.

All the while, drafting of the agreement continued. Once the legal fees were finalized, the parties concentrated on drafting details until the final moment was reached: the parties signed the agreement and parted for the day.

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When the parties reach the point where they are *ad idem* on principal terms such as the payment amount and payment date, the final stage of the negotiation process is entered into.<sup>66</sup> It is here that a cooperative effort is clearly evident. The parties work together to formalize the details of the agreement and the arrangements necessary for the agreement to be

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<sup>66</sup> ROBERTS & PALMER, *supra* note 11, at 129–30, speak of the need to amend Gulliver's formulation from Final Bargaining to Ritual Affirmation to recognize the potential need for additional negotiation between the time an agreement in principle is reached and an agreement in writing is executed.

finalized.<sup>67</sup> The parties are generally no longer approaching the negotiation in a competitive mode; rather, the parties cooperate to get the deal done. This is particularly acute for the drafting of the written agreement. The whole agreement or portions of it are drafted either jointly by the parties or one party takes the responsibility for preparing a first draft for comment by the other, which is what occurred in this case.

Once the first draft is prepared, there is joint discussion about its contents and any changes that need to be made to it. Cooperation typically reigns supreme during this period. This supports Stevens' view that negotiators are competitive in early stages and cooperative in later stages.<sup>68</sup> The difference here is that the data suggests a competitive strategic approach is taken throughout the phases of negotiation with a suggested appearance of coordinated efforts occurring during the bargaining phase but which are really fueled by competitive action and goals. It is only in the final phase that problem-solving and cooperation dominate. The domination, however, is dependent on the existence of an agreement on major terms with ancillary terms to be determined.

For example, often issues arise and further negotiation is required on distinct points, as occurred here. They are discussed and, if necessary, mini-negotiations are conducted of the issue, similar to the negotiation between Shelley and Riverdale. Two issues relating to the £400,000 payment were raised: the tax allocation of the payment and the payment by Riverdale of Shelley's legal costs. It appeared, at times, that the parties would not overcome the new disputes generated by these two issues and that the negotiation would not lead to resolution. However, the aim of both parties is not to lose the agreement that was reached in principle. Parties often strain to resolve any issues that arise during this phase.<sup>69</sup> Both problem-solving and competitive tactics are implemented during this phase. For example, when discussing the tax apportionment of the payment, joint problem-solving was evident: the parties considered how to make the payment most tax efficient with reduced risk to the parties.

With respect to the issue of the legal costs, however, Shelley turned to competitive tactics, threatening to walk away from the deal if her costs were not paid. Cognitive barriers were in play once again. There was an escalation

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<sup>67</sup> One of the conditions of the mediations conducted during this ethnographic study requires all agreements achieved at mediation be confirmed in writing. No agreement is reached until it is in writing and signed by the parties.

<sup>68</sup> STEVENS, *supra* note 8, at 107–09.

<sup>69</sup> This is based on the data obtained from the mediations observed during the period of ethnographic fieldwork.

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of commitment as seen in phase one, an assumption that any gain for one was at the expense of the other party, rigid thinking about the issue, and arguably, a desire for equity; that is, a need for a recognition of suffering through payment of the legal fees. The payment of legal fees was an important issue for Shelley and one she thought had been conceded earlier in the negotiation. That may have accounted for the competitive nature of the interaction. Ultimately, however, both parties compromised and resolved the issue. Given the fact this remained the only outstanding issue to be resolved with other major items agreed, it is not surprising, and indeed it was expected, the parties would compromise to complete the agreement. This is another instance, perhaps, of Schelling's pure bargaining.

Final agreement is reached when the parties sign the agreement, either in each other's presence or alone.<sup>70</sup> Any remaining steps to be taken, such as filing a court order, are delegated to the legal representatives of one of the parties to complete. Resolution is achieved and the parties depart, each with a copy of a signed agreement in hand. The negotiation has ended.

## V. THE PROCESSUAL ARC

Theorists and others speak of the negotiation process as stages during which parties seek to explore bargaining ranges, to establish bargaining ranges, to uncover maximum limits, and to determine the contract zone.<sup>71</sup> From an analysis of the six case studies, this is not what appears to occur in the phases; rather, the objectives of each phase seem to be (i) persuading as to the strength of positions and (ii) the undermining of the opponent's position. It does not appear that parties are interested in bargaining ranges until the bargaining proposal stage is reached. One may argue the earlier phases help to establish a range through the information exchange that occurs. Parties are always assessing one another and are making judgments about the dispute, information to disclose, movements to make, and offers to deliver. By doing this, they come upon the bargaining range for the negotiation and it is within such range that proposals are made. However, it cannot be said that a specific goal of the earlier phases is to set a range, as suggested by Douglas or Gulliver.<sup>72</sup>

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<sup>70</sup> Recall the need for a signed written agreement as a condition precedent to agreement.

<sup>71</sup> These theorists include GULLIVER, *supra* note 5; Douglas, *supra* note 10; STEVENS, *supra* note 8; STENEL, *supra* note 9; and WILLIAMS, *supra* note 11.

<sup>72</sup> Douglas, *supra* note 10, at 72–81 and GULLIVER, *supra* note 5, at 122–70.

The data suggests that the six phases sit on a bi-directional plane, establishing the foundational elements of the process. The phases occur in what appears to be a sequential and cumulative manner. The process begins with each party articulating their position. This evolves into a period of information exchange, followed by testing of positions. These lead to a shift in position, which begins the bargaining phase. The next two phases—bargaining proposals and joint decisionmaking—are dependent on these phases. In other words, the bargaining proposal stage is not reached until the first four stages have occurred. And, joint decisionmaking for final agreement does not occur until bargaining is completed. On this point, there is consensus with Gulliver's view that the negotiation process encompasses all phases of the proposed model, and that each phase must be completed for agreement to be reached.<sup>73</sup> Figure 1 below illustrates the location of these phases on the bi-directional plane:

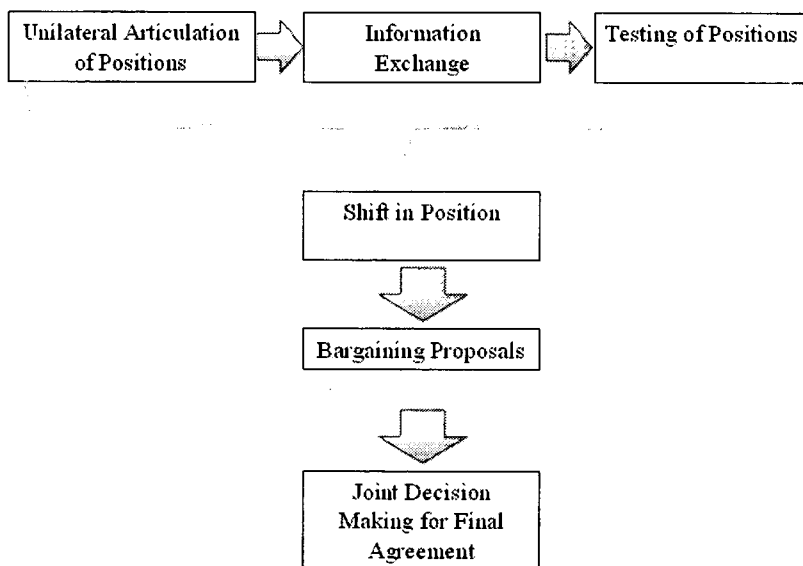


Figure 1

The first three phases, however, are not rigid in their movement. They can be fluid and can occur at any time during the negotiation process. For example, testing of positions can also occur during the phase of bargaining proposals. Articulation of positions and information exchange can occur throughout. Once introduced, the phases of the lateral plane—Unilateral Articulation of Position, Information Exchange, and Testing of Positions—

<sup>73</sup> GULLIVER, *supra* note 5, at 174–77.



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repeat, jump, and superimpose themselves on this bi-directional plane. There is an underlying structure superimposed by its own elements: the structure is composed of six phases through which negotiators move to reach the conclusion of a negotiation. However, within that six-phase structure, the elements of the first three phases re-emerge and overlap with the other phases as the negotiation proceeds. They become part of a repetitive pattern, superimposed above and within the basic structure. The structure has echoes of Gulliver's hybrid model, although in compressed form.<sup>74</sup> Figure 2 below illustrates the movement of phases of the processual arc:

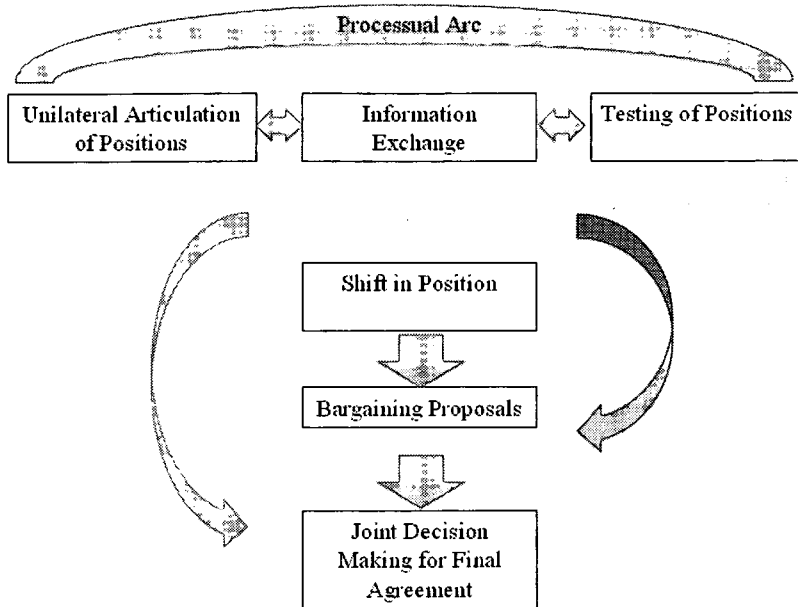


Figure 2

Negotiation is a fluid and complex process dependant on its participants. Its interactions occur within a normative and psychological context. Underlying the interactions is a structure which drives it to a conclusion. It is that structure which comprises the process of negotiation. This study has attempted to construct a model of negotiation suggested by an analysis of

<sup>74</sup> GULLIVER, *supra* note 5, at 82-177 speaks of two models forming the process of negotiation: the cyclical model of information exchange and learning, and the developmental model of eight phases of negotiation. One may argue that the first three phases here discussed are cyclical in the nature of Gulliver's model. However, they are more than cyclical. In Gulliver's terms, they would form part of his developmental model and be cyclical within that developmental model.

research data as a way to understand the real-life patterns of negotiating conduct. The six phases suggest a processual framework through which negotiated order may be attained. Processual theorists have offered various analyses of the process. It is the hope of this study to add to this understanding by focusing on negotiations in action and, by having observed, textualized and analyzed them, to lessen the opaqueness of its process. In so doing, it seeks to offer an alternative understanding to the actions taken during the course of a negotiated resolution of a dispute.